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IMPACT OF ATTORNEY GENERAL'S GUIDELINES  
FOR DOMESTIC SECURITY INVESTIGATIONS  
(THE LEVI GUIDELINES)

REPORT  
OF THE CHAIRMAN OF THE SUBCOMMITTEE ON  
SECURITY AND TERRORISM  
FOR THE USE OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE



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(II)

## LETTER OF TRANSMITTAL

U.S. SENATE,  
SUBCOMMITTEE ON SECURITY AND TERRORISM,  
*Washington, D.C., November 30, 1983.*

HON. STROM THURMOND,  
*Chairman, Committee on the Judiciary,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: As you know, the Subcommittee on Security and Terrorism completed its inquiry into FBI operations undertaken pursuant to the Attorney General's Guidelines for Domestic Security Investigations (Levi guidelines). The transcripts of these hearings were published in late 1982, and a subsequent followup hearing on Attorney General Smith's revisions to the guidelines was held on March 25, 1983. The transcript of this hearing was published on September 6, 1983.

To augment the first series of hearings, I believe it will prove to be useful to have a report on the history of the FBI's involvement in issues of domestic security and subversion as well as an analysis of practices in effect prior to the "Smith" revisions. This analysis also covers the subcommittee hearings held on June 24, 25, August 11 and 12, 1982.

It is with pleasure that I transmit to you this report. I am deeply indebted to Dr. Samuel T. Francis, of Senator John East's staff, for his assistance in its preparation.

Sincerely,

JEREMIAH DENTON,  
*Chairman, Subcommittee on*  
*Security and Terrorism.*

(III)

## FOREWORD

This report has been prepared to accompany five hearings held on the domestic security guidelines by the Subcommittee on Security and Terrorism during the 97th and 98th Congresses. Testimony received examined not only the language of the 1976 guidelines, but, more importantly, how that language was interpreted by FBI officials and how the policy derived from those interpretations affected the Bureau's ability to collect intelligence on domestic groups, some of which had potential for violent activity. In his testimony on June 24, 1982, Director Webster acknowledged that some modifications of the domestic security guidelines might be in order and stated that, to that end, a review of the guidelines by the FBI and the Department of Justice was underway. After the subcommittee hearings were completed and the results studied by the Department of Justice, revised guidelines were prepared and submitted to the subcommittee in advance of their promulgation. The revised guidelines became effective on Monday, March 21, 1983.

In an effort to summarize relevant portions of the hearings of the subcommittee on the guidelines, and to make this summary available in permanent form, the Judiciary Committee has chosen to publish a committee print on the "Impact of the Attorney General's Guidelines for Domestic Security Investigations". I am convinced that this print will serve as an important document which not only outlines the concerns about the domestic security guidelines, but also makes recommendations for revisions to the guidelines, which address those concerns.

STROM THURMOND,  
*Chairman, Committee on the Judiciary.*

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(VII)

## IMPACT OF ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (THE LEVI GUIDELINES)

### INTRODUCTION

In an FBI Oversight Hearing before the Subcommittee on Security and Terrorism on February 4, 1982, Senator John P. East suggested that the chairman schedule hearings on the Attorney General's Guidelines for Domestic Security Investigations by the FBI—the so-called Levi guidelines. Judge William Webster, Director of the FBI, had stated in response to questioning by Senator East that the FBI and the Department of Justice (DOJ) were currently reviewing and evaluating the guidelines for the purpose of revising them. The chairman, as well as Senator Biden, agreed that there is a continuing need to evaluate the guidelines, and the subcommittee, pursuant to its oversight responsibility for the FBI and its authority to investigate matters pertinent to the internal security of the United States, scheduled hearings on the subject of the Levi guidelines. The hearings were held on June 24 and 25 and August 11 and 12, 1982.

The chairman, in his introductory remarks on June 24, 1982, explained the concerns of the subcommittee and the purpose of the hearings:

Of primary interest to the subcommittee will be the effect that these guidelines have had on the ability of the FBI and other agencies to gather information or intelligence and to discharge their domestic security and other responsibilities.<sup>1</sup>

While praising the record of the FBI in the investigation of crime, foreign counterintelligence, and counterterrorist activities, the chairman noted a gap in the investigative activities of the FBI:

What seems to be missing, however, is attention to organizations and individuals that cannot be shown to be controlled by a foreign power, and which have not yet committed a terrorist or subversive act, but which nevertheless in reality may represent a substantial threat to the safety of Americans and, ultimately, to the security of this country. \* \* \* Recognizing the limitations that have been imposed on the FBI, they would understandably attempt to hide themselves among other groups in areas well protected by the first amendment and thereby escape the scrutiny of the Bureau.<sup>2</sup>

<sup>1</sup> *Domestic Security (Levi) Guidelines*, hearings before the Subcommittee on Security and Terrorism of the Committee on the Judiciary, United States Senate, 97th Cong., 2d sess., on the Domestic Security Investigation Guidelines, June 24, 25; Aug. 11 and 12, 1982 (hereinafter cited as *Hearings*), p. 1.

<sup>2</sup> *Ibid.*, p. 2.

Senator East, in his opening statement, expressed a similar concern about the guidelines:

It occurs to me that under these guidelines, with the criminal predicate concept, you must show criminal activity precedent to or imminent criminal activity precedent to criminal investigation. It tends to throw up then a very real barrier to have to get over in terms of investigating a threat which by definition and nature does not often lend itself to that kind of approach. \* \* \* Intelligence data is very important in this case to allow us to anticipate and to prevent genuine and real threats to this country in whatever form they might take.<sup>3</sup>

Accordingly, the primary interest of the subcommittee, in this series of hearings, was to inquire into the effect of the Levi guidelines on FBI domestic security investigations and the gathering of domestic intelligence; the need for and value of domestic intelligence in addressing the problems of counterterrorism, foreign counterintelligence, domestic subversion, and other internal security threats; and the remedies available to redress whatever shortcomings may exist in the current guidelines. The subcommittee was not primarily interested in the legal and constitutional problems of the authority for domestic security investigations nor in the largely administrative and budgetary problem of the availability of resources with which the FBI conducts domestic security activities. Although the subcommittee recognized that both problems are important for the issue of domestic security, it chose to select the problem of the effect of the guidelines on internal security as its principal interest in the series of hearings.

#### HISTORY OF AND AUTHORITY FOR FBI DOMESTIC SECURITY INVESTIGATIONS

##### (A) HISTORY

The Federal Bureau of Investigation (FBI) and its predecessor, the Bureau of Investigation, have been engaged in domestic security intelligence gathering and domestic security investigations since World War I. In 1924, Attorney General Harlan Fisk Stone curtailed most Bureau domestic security activities and intelligence gathering by mandating that the Bureau of Investigation was "concerned only with such conduct as is forbidden by the laws of the United States."<sup>4</sup> Although adherence to this "criminal standard" was not absolute in the following years, it did remove the FBI from most domestic security activities that did not involve the investigation of a violation of Federal law.

In the 1930's, however, President Franklin D. Roosevelt expressed concern about the increasing indications of Communist, Fascist, and other subversive activities within the United States. At his direction the FBI again became involved in the investigation of and gathering of intelligence on such activities, and its role expanded as World War II approached, during the war, and during the development of the

<sup>3</sup> *Ibid.*, pp. 5 and 7.

<sup>4</sup> *Intelligence Activities Senate Resolution 21*, hearings before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate, 94th Cong., 1st sess., vol. 6, Federal Bureau of Investigation, Nov. 18, 19, Dec. 2, 3, 9, 10, and 11, 1975 (hereinafter cited as *Intelligence Activities*, VI), quoted p. 314.

"Cold War" following 1945. From the end of World War II until the mid-1970's, the FBI was broadly engaged in domestic security investigations, and, although the details of this activity were generally not publicly known, there was broad public, congressional, and executive branch approval of the domestic security work of the FBI. In the early and mid-1970's, in the aftermath of the Vietnam conflict, in the "era of detente" with the Soviet Union, and following the revelation of abuses in the Watergate matter, domestic security investigations became far more controversial. Congressional committees and journalistic investigations discussed what were alleged to be abuses and excesses in the domestic security work of the FBI. It was in this climate of controversy that the FBI began to curtail its involvement in domestic intelligence and that Attorney General Edward H. Levi issued the Attorney General's Guidelines for Domestic Security Investigations on March 10, 1976. The guidelines went into effect on April 6, 1976.

(B) AUTHORITY

The FBI has cited a number of authorities for its involvement in domestic security investigations. A series of five Presidential directives (June 26 and September 6, 1939, and June 8, 1943, issued by President Roosevelt; July 24, 1950, issued by President Truman; and December 15, 1953, issued by President Eisenhower) and memoranda from FBI Director J. Edgar Hoover concerning private conversations and directives he had received from President Roosevelt in 1934 and 1936 have been cited by the FBI as authorizing investigation of matters pertaining to espionage, counterespionage, sabotage, violation of neutrality regulations, and subversive activities. The FBI has also cited Executive Order 10450 (April 27, 1953) and other Executive orders that deal with and authorize the Federal employees security program. Section 8(d) of E.O. 10450, which remains in force, requires that the FBI conduct a full field investigation of any individual who "may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security" or whose loyalty or security as an employee of the Federal Government is in question.

The FBI has also cited statutory authority for its investigation of domestic security matters. The Federal statute 28 U.S.C. 533 states:

The Attorney General may appoint officials—

- (1) to detect and prosecute crimes against the United States;
- (2) to assist in the protection of the person of the President; and
- (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

This section is drawn from the Department of Justice Appropriations Act of 1965, although similar language has been contained in each Appropriation Act since 1921, and the General Accounting Office (GAO), in a study of FBI domestic security investigations published in 1976, found comparable language as early as 1871 in the Sundry



Appropriations Act of that year.<sup>5</sup> In testimony on December 11, 1975, before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Attorney General Levi stated:

The argument is sometimes made that the Bureau's proper role, at least in purely domestic matters, should be limited to investigations of committed crimes. The basic statute for the Bureau [28 U.S.C. 533] is broader. \* \* \* it refers to investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.<sup>6</sup>

A memorandum of March 31, 1977, from Mary C. Lawton, chairman of the FBI Guidelines Committee within DOJ, that was submitted for the record in a hearing before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives on November 9, 1977, states in part:

We recognize that express statutory authority for domestic security investigations is needed. In the interim, however, it is our view that the Supreme Court has found implicit constitutional authority to prevent crime and to collect intelligence for this purpose and that 28 U.S.C. 533 is sufficiently broad to permit the Attorney General to authorize such investigations.<sup>7</sup>

The same memorandum also argues that courts have found repeatedly that the provisions of the U.S. Constitution—article II, section 1, requiring that the President take care that the laws be faithfully executed; article II, section 3, containing the Presidential oath to "preserve, protect, and defend" the Constitution; and article IV, section 4, directing the Federal Government to protect the States against domestic violence—authorize preventive measures for law enforcement purposes and that several court cases have suggested that intelligence collection is a reasonable means for the prevention of criminal conduct.

The FBI response of August 30, 1982, to the question, submitted by the subcommittee on June 14, 1982, "What is the current statutory authority for domestic security investigations?" cited 28 U.S.C. 533 as the "basic authority of the Federal Bureau of Investigation to conduct domestic security investigations" and also cited

Other statutes, such as the Congressional Assassination, Kidnapping and Assault Act, that give the Bureau special responsibilities to investigate particular crimes. In addition, there are Executive Orders and Presidential statements or directives which place investigatory responsibilities upon the Bureau to gather information bearing on our Nation's security.<sup>8</sup>

<sup>5</sup> General Accounting Office, *FBI Domestic Intelligence Operations—Their Purpose and Scope: Issues That Need To Be Resolved*. Report to the House Committee on the Judiciary by the Comptroller General of the United States, Feb. 24, 1976 (hereinafter cited as *G.A.O. Report*), p. 22.

<sup>6</sup> *Intelligence Activities*, VI, 313-14.

<sup>7</sup> *FBI Oversight*, hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 95th Cong., 1st sess., on FBI Charter Proposals and the Operation of the Attorney General's Domestic Intelligence Guidelines; FBI's Freedom of Information and Privacy Act Operations; and GAO Followup Report on Domestic Intelligence Efforts, June 6, 27, and Nov. 9, 1977, pt. 1, p. 228.

<sup>8</sup> *Hearings*, p. 65.

## (C) DECLINE IN NUMBERS OF DOMESTIC SECURITY INVESTIGATIONS

In testimony before a Subcommittee of the Committee on Appropriations of the House of Representatives on March 16, 1978, Director Webster provided the following account of the decrease in the number of FBI domestic security investigations in the 1970's:<sup>9</sup>

Date:	Number of domestic security investigations
July 31, 1973.....	21,414
Mar. 31, 1976.....	4,868
Sept. 20, 1976.....	626
Feb. 24, 1978.....	102

In the written response to questions from the subcommittee cited above, the FBI stated that as of August 20, 1982, it had a total of 38 current domestic security investigations, including 22 organizations and 16 individuals. Of the 22 organizational investigations, 8 were being conducted at the level of "full investigation" under the Levi guidelines.

Two conclusions may be drawn from these statistics: (a) During the last 9 years the domestic security investigations of the FBI declined by 99.8 percent, leading Director Webster to state publicly on May 3, 1978, that the FBI was "practically out of the domestic security field"; and (b) although there was a decline of 77.3 percent in the number of domestic security investigations between 1973 and the imposition of the Levi guidelines on April 6, 1976, there was a more dramatic decrease of 87 percent in the 9 months following their imposition and a far more precipitous decrease of 99 percent between their imposition and the current year. This decline in the number of domestic security investigations prior to the Levi guidelines indicates that the FBI was reducing its domestic security work for some time before the guidelines were imposed, but the drastic decline following the imposition of the guidelines strongly suggests that the guidelines themselves were the principal reason for the further decrease.

Director Webster, however, expressed his belief that factors other than or in addition to the guidelines were responsible for this decrease. On June 24, 1982, the Director stated that these other factors included the facts that "some of the laws and regulations dealing with internal security matters have changed substantially" in the last 10 years and that "changes in the internal policies of the Bureau also affected the program."

Investigations on "rank and file" members were discontinued, some were shifted to the Foreign Counterintelligence Guidelines, and others were closed with the new emphasis on quality over quantity.<sup>10</sup>

The Director also pointed to "changes in the political climate" of the Nation and emphasized that some investigations for criminal activities may overlap with some domestic security matters, so that criminal investigations may include domestic security matters, although they are not labeled as such.

<sup>9</sup> *Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies, Appropriations for 1979*, hearings before a Subcommittee on the Committee on Appropriations, House of Representatives, 95th Cong., 2d sess., Subcommittee on the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies, pt. 6, Department of Justice (hereinafter cited as *Appropriations, Department of Justice*), pp. 654-55.

<sup>10</sup> *Hearings*, p. 9.

The changes in "laws and regulations" that Director Webster specified were the abolition of the Attorney General's List of Subversive Organizations, the repeal of the Emergency Detention Act of 1950, and the discontinuation of "certain domestic intelligence investigations conducted in support of the Government employees security program."

The "List of Organizations Designated by the Attorney General Pursuant to Executive Order 10450" was authorized by E.O. 10450 and continued to be published until, on June 4, 1974, President Nixon issued Executive Order 11785, which abolished the Attorney General's List. The Emergency Detention Act of 1950 (50 U.S.C. 811-826) was repealed by Act of Congress on September 25, 1971 (85 Stat. 345, § 2(a)). It will be noted that, even after the abolition of the Attorney General's List and the repeal of the Emergency Detention Act, the FBI continued to conduct thousands of domestic security investigations. A memorandum of October 22, 1971, from Attorney General John N. Mitchell to FBI Director J. Edgar Hoover, stated in part:

With respect to your initial inquiry, I wish to advise you that the FBI's authority to investigate violations of the espionage, sabotage, Smith Act, Atomic Energy Act and related statutes, as well as subversive activities and related matters in accordance with its statutory responsibilities and the Presidential directives [see above], cited in your memorandum, remains unaffected by the repeal of the Emergency Detention Act.<sup>11</sup>

And in a memorandum of November 19, 1974, to FBI Director Clarence M. Kelley, in reference to the effect of E.O. 11785 on FBI investigative activities, Mr. Glen E. Pommerening, Assistant Attorney General for Administration, stated in part:

It is true that Executive Order 11785 eliminated the prior communist, totalitarian, fascist, and subversive characterizations and definitions, but there was no intention of restricting the investigations of such organizations if their programs call for acts of force or violence or the unlawful advocacy of the commission of acts of force or violence in furtherance of these programs.<sup>12</sup>

The import of these memoranda and of the statistical data showing the continuation of FBI domestic security investigations on a large scale after the abolition of the Attorney General's List and the repeal of the Emergency Detention Act appears to be that the legal authority for FBI domestic security investigations was not seriously affected or limited by these legal changes and that these changes did not compel the numerical decreases in domestic security investigations in the early 1970's. Such changes may have contributed to the elimination of a legally mandated need for certain kinds of domestic security investigations and they may have instigated a change of attitudes on the part of some FBI officials toward the need or value of some kinds of investigations, but these changes in themselves did not limit or remove the legal authority for domestic security investigations. Director Webster

<sup>11</sup> *Intelligence Activities*, VI, 658.

<sup>12</sup> *Ibid.*, p. 707.

himself, in the statement before the House subcommittee on March 16, 1978, cited above, said specifically that

Domestic security investigations in the FBI underwent a radical change, both in number and in scope, as a result of the adoption on April 6, 1976, of the Attorney General's Guidelines for Domestic Security Investigations, which were implemented on that date.<sup>13</sup>

and he did not attribute the decrease in numbers to changes in the statutory authority for such investigations.

Director Webster, in his statement of 1978 as well as in his testimony on June 24, 1982, also referred to changes in FBI internal policy that served to reduce the number of domestic security investigations. It is true that changes in FBI internal policy had this effect. Prior to the imposition of the Levi guidelines, domestic intelligence gathering was conducted by the Intelligence Division (Division 5) of the FBI, which also conducted Foreign Counter Intelligence (FCI) investigations. These domestic intelligence investigations were not necessarily predicated on prior or imminent criminal conduct on the part of the subjects of the investigations, but were conducted for the purpose of gathering intelligence on subversive activities, whether in violation of the law or not. Following the adoption of the guidelines, the criminal predicate contained within them required indication of prior or imminent criminal conduct on the part of the subjects as a precondition for the opening of a domestic security investigation. The adoption of this criminal predicate led to the removal of domestic security investigations from Division 5 and their transference to Division 6, the General Investigative Division of the FBI, which conducts investigations of criminal matters in general. Investigations of some matters previously included under domestic security investigations, which did not necessarily involve the violation of law but did concern national security (for example, the Communist Party U.S.A.), were retained in Division 5 as part of the FCI program. The conclusion must be, therefore, that although the adoption of the Levi guidelines did lead to the transference of some domestic security matters to criminal investigative authorities, the criminal predicate of the guidelines themselves was primarily responsible for the elimination of large numbers of domestic security investigations, and indeed that the Levi guidelines themselves were the principal cause of the drastic decline in the number of FBI domestic security investigations after March 1976.

#### IMPACT OF THE LEVI GUIDELINES ON DOMESTIC INTELLIGENCE

The Levi guidelines impose a "criminal standard" or "criminal predicate" for the initiation and continuation of domestic security investigations. Section I—"Bases of Investigation"—of the guidelines states:

Domestic security investigations are conducted, when authorized under Section II(C), II(F), or II(I), to ascertain information on the activities of individuals, or the activities of groups, which involve or will involve the use of force or vio-

<sup>13</sup> *Appropriations, Department of Justice*, p. 654.

lence and which involve or will involve the violation of federal law, for the purpose of:

(1) overthrowing the government of the United States or the government of a State;

(2) substantially interfering, in the United States, with the activities of a foreign government or its authorized representatives;

(3) substantially impairing for the purpose of influencing U.S. government policies or decisions:

(a) the functioning of the government of the United States;

(b) the functioning of the government of a State; or

(c) interstate commerce;

(4) depriving persons of their civil rights under the Constitution, laws, or treaties of the United States.<sup>14</sup>

The guidelines establish three levels of investigation—preliminary, limited, and full—each of which is initiated under distinct procedures and under each of which different investigative techniques may be used.

A preliminary investigation is authorized “on the basis of allegations or other information” that an individual or group is engaged or will be engaged in the use of force or violence, which involves or will involve the violation of Federal law, for the specific purposes cited in the guidelines. A preliminary investigation is restricted to the gathering of information or allegations that led to the investigation. During a preliminary investigation, therefore, the FBI is confined to examining its own files and indices; public sources of information; other Federal, State, and local records; and existing sources and previously established informants. During a preliminary investigation the FBI may conduct physical surveillance and interviews restricted to the identification of the subject of the investigation. Although a preliminary investigation may be initiated by the Special Agent in Charge (SAC) of a field office of the FBI and does not require FBI Headquarters (FBIHQ) approval, all preliminary investigations must be closed within 90 days of their initiation unless an extension of 90 days is obtained from FBIHQ; such an extension must be justified.

A limited investigation must be authorized in writing by an SAC or by FBIHQ if the preliminary level is unable to verify or refute the bases of the investigation. The only differences between the techniques permissible in a preliminary and limited investigation is that, in the latter, the FBI may conduct physical surveillance and interviews for purposes other than identifying the subject, but only with the authorization of the SAC and under restrictions. In neither a limited nor a preliminary investigation may the FBI recruit or emplace informants within groups, make use of “mail covers” (that is, examination of the outside of mail to learn the addressee, addressor, or the date and place of posting), or make use of any electronic surveillance. A limited investigation is continued, terminated, or extended under the same conditions as a preliminary investigation.

<sup>14</sup> *Hearings*, Appendix, FBI Guidelines, p. 51.

The third level of investigation—the full investigation—may make use of the techniques prohibited in the preliminary and limited levels, but only under restrictions and with the approval of FBIHQ or the Attorney General. Full investigations must be authorized by FBIHQ and

They may only be authorized on the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence and which involve or will involve the violation of federal law \* \* \* <sup>15</sup>

for the purposes specified in section I of the guidelines. Full investigations are reviewed annually by DOJ, which determines whether a full investigation may continue, and no full investigation may continue beyond a year without authorization by DOJ. FBIHQ or the Attorney General (or his designee) may terminate any domestic security investigation at any level at any time.

Although the adoption of a criminal standard for domestic security investigations has served to curtail the number of such investigations, the restrictions on the techniques of investigation and the procedures for authorization and termination have also tended to inhibit the gathering of information pertinent to internal security and law enforcement. In a preliminary investigation, the FBI may not obtain any information that is not already in its possession or in the possession of other governmental or public sources or which cannot be obtained from existing sources and informants, and its investigation is normally limited to 90 days. In a limited investigation, the same restrictions apply, except that the FBI may conduct physical surveillance and interviews other than for the identification of the subject. Since any domestic security investigation is predicated on the basis of alleged current or imminent criminal conduct, and since it may be presumed that a party involved in or planning criminal activities would make efforts to conceal such involvement from authorities and from public sources of information, there may be some question about the usefulness of the preliminary and limited levels of investigation for the discovery, prevention, and apprehension of criminal conduct.

Although a criminal standard has an inhibitive effect on the preliminary and limited levels of domestic security investigations, a far more restrictive criminal predicate is required for the initiation of a full investigation. While the preliminary and limited levels of investigation are initiated "on the basis of allegations or other information" indicating current or imminent criminal activities, a full investigation may be initiated only "on the basis of specific and articulable facts giving reason to believe" that criminal conduct is current or imminent. A mere allegation of such conduct is not sufficient, regardless of the reliability of the source of the allegation. In addition to the "specific and articulable facts," FBIHQ must also consider other factors in authorizing a full investigation. These other factors are—

- (1) the magnitude of the threatened harm,
- (2) the likelihood it will occur,

<sup>15</sup> *Ibid.*, p. 53.

- (3) the immediacy of the threat, and
- (4) the danger to privacy and free expression posed by a full investigation.

The more stringent criminal standard required for a full investigation, and the inclusion as well of other factors as grounds for authorizing a full investigation, suggest that it is very difficult to move from the preliminary or limited levels of investigation (in which only certain kinds of information can be obtained or sought and only by certain very limited techniques) to the full investigation. This suggestion is borne out by statistics of current domestic security investigations; of 38 domestic security investigations current in August 1982, only 8 were being conducted at the level of full investigation.

The formulation of the criminal standard in the Levi guidelines requires, at all levels of investigation, an indication of the violation of Federal law in addition to the use of force or violence. In other words, the use of force or violence and a violation of State law by a subject would not ordinarily be sufficient to initiate a domestic security investigation by the FBI under the Levi guidelines. Although the FBI is primarily an investigative, law enforcement, and counterintelligence agency for the Federal Government, it has historically provided invaluable assistance to local and State law enforcement agencies that do not possess the resources or skills to undertake by themselves adequate investigations of a domestic security nature. The restriction of the criminal standard of the guidelines to Federal law therefore tends to limit the value of the FBI to local and State agencies that have legitimate interests in domestic security matters within their jurisdictions.

#### NEED FOR DOMESTIC INTELLIGENCE BY FEDERAL AGENCIES

In addition to a need for domestic intelligence at the State and local levels, there is also a continuing need for such intelligence by Federal agencies that must know the potential for a terrorist attack on their facilities or persons or institutions under their protection. Such agencies include the U.S. Secret Service and the U.S. Park Police as well as others. The U.S. Department of State, for example, welcomes to the United States many foreign dignitaries who are often the target of dissident demonstrations or are the potential targets of terrorist attacks. The State Department, therefore, has a continuing need to know the potential for such attacks by domestic groups, and it must turn principally to the FBI for assessments of this danger. The U.S. Department of Energy also requires information on groups likely to target nuclear or other energy facilities for violent attacks or demonstrations. The Department of Defense also needs to know what civilian groups or individuals are likely to target DOD installations and personnel for disruption or attack.

The subcommittee undertook to inquire into the need of such Federal agencies for domestic intelligence and the degree to which these needs were being fulfilled by the FBI under the Levi guidelines. Consequently, representatives of the U.S. Secret Service, the U.S. Park Police, and some local and State agencies were invited to appear before the subcommittee. Also appearing before the subcommittee for the

same purpose were former officers and agents of such organizations who gave their opinion and expert testimony on the intelligence requirements of their former agencies and the degree to which these requirements can be fulfilled under the Levi guidelines.

In a publication issued by the General Counsel of the U.S. Department of the Treasury in August 1981 (*Management Review on the Performance of the U.S. Department of the Treasury in Connection with the March 30, 1981, Assassination Attempt on President Ronald Reagan*), it was stated:

From the protection-oriented perspective of the [Secret] Service, therefore, the decline in FBI domestic intelligence activities has caused a critical overall decline in the useful information the Service receives from the FBI. In November 1979, Secret Service Director Stuart Knight testified before the Senate Judiciary Committee that the Service was, at that time, receiving only about 40 percent of what it had previously received from the FBI, and that this reduced intelligence product had deteriorated in quality. Explaining what he meant by quality, he referred to the loss of information concerning motives and plans.

Knight repeated these statements in the aftermath of the March 30 assassination attempt, in testimony before other committees of the House and Senate, specifically attributing this loss of useful intelligence to the Attorney General's Domestic Security Guidelines.<sup>16</sup>

And one of the recommendations that the *Management Review* issued was that

Consideration should be given to permitting the FBI to pursue domestic security investigations where no criminal predicate is available; this may be done through appropriate modifications of the Attorney General's Domestic Security Guidelines for the FBI.<sup>17</sup>

A similar view was presented to the subcommittee on August 11, 1982, by Mr. John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations. Mr. Walker pointed out that the Secret Service is responsible for the protection of the persons of the President and Vice President of the United States, of foreign heads of government and state while visiting the United States, of the major candidates for President and Vice President during Presidential campaigns, and of certain other persons as designated (for example, the immediate families of the President and Vice President or of other protectees, former Presidents or Vice Presidents, and other foreign or official representatives as designated). The Secret Service, however, is primarily a consumer of domestic security information that bears on the threats presented to these protectees. It does not normally collect such intelligence itself, and it lacks the institutional capability of collecting and analyzing such intelligence adequately.

<sup>16</sup> Department of the Treasury, Office of the General Counsel, *Management Review on the Performance of the U.S. Department of the Treasury in Connection with the March 30, 1981 Assassination Attempt on President Ronald Reagan* (August 1981), p. 31.

<sup>17</sup> *Ibid.*, p. 39.



Mr. Walker emphasized that the Secret Service is concerned with the threats to its protectees presented by

the terrorist, a group-affiliated individual whose motivation and identity are acquired through that group. The Secret Service needs to know about this kind of person and about the intentions and activities of a number of terrorist groups.<sup>18</sup>

Although acknowledging that the FBI has "broad statutory jurisdiction" over the investigation of domestic terrorist groups, Mr. Walker pointed out that

The Secret Service is primarily a consumer of this type of information as opposed to a collector. In order to effectively carry out its mission, the Secret Service has traditionally relied heavily on the FBI as the major source for the investigation of domestic terrorist groups and the gathering of intelligence on their activities. The Service needs information describing the location, structure, plans and activities of potentially violent groups as well as reports furnishing background data and current activities of individual group members. The purpose of this information is to put the Service in a position of preventing attacks, not just reacting to them.<sup>19</sup>

Mr. Walker further indicated that recent reductions in the domestic security investigative activities of the FBI had had a harmful effect on the ability of the Secret Service to carry out its mission.

The problem is that the FBI has been hindered in collecting certain vital information about groups by the Attorney General's domestic security guidelines. \* \* \* Prior to the Levi Guidelines, the Secret Service received from the FBI a vast amount of intelligence information on individuals and potentially violent groups who might be considered to be threats to domestic security. There was a considerable amount of valuable information contained in these referrals.<sup>20</sup>

Mr. Walker also emphasized that the present lack of adequate intelligence forthcoming from the FBI was not in any way due to a lack of cooperation between the FBI and the Secret Service:

The level of cooperation between the U.S. Secret Service and the FBI has never been better. The Secret Service is satisfied that it gets all of the intelligence information which the FBI has with respect to individuals and groups who constitute a potential threat to the President and other protected persons.<sup>21</sup>

Although Mr. Walker expressed his satisfaction that "the reduction of the quantity of reports furnished is not per se the major problem," he emphasized that

The problem is that there are important areas of investigation that are not being pursued since the guidelines have been in effect. As a result of the 1976 guidelines, the most notable

<sup>18</sup> *Hearings*, p. 132.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, p. 133.

<sup>21</sup> *Ibid.*, p. 132.

lack of information in reports received from the FBI occurred in those areas describing the location, structure, plans and activities of numerous radical and emigre groups.<sup>22</sup>

The Director of the U.S. Secret Service, Mr. John R. Simpson, submitted similar testimony:

Quite simply, it is my view that the guidelines, as presently structured, impose an unrealistic and unnecessary barrier to the collection of essential information.

As the guidelines are written and interpreted, a preliminary investigation by the FBI, the lowest category of domestic intelligence investigations, will not be undertaken in the absence of an allegation or other information indicating that an individual or group will use force or violence in violating a Federal law. Such a policy, in my view, falls a little short of telling a police officer to patrol with his eyes closed unless and until he is hit with a brick. Unfortunately, as the history of assassinations points out, such an after-the-fact response is likely to be too little and too late. \* \* \* What we would hope to see recognized by the guidelines, however, is the fact that the Government cannot make intelligent and informed decisions concerning potential sources of political terrorism in a vacuum. It is only with a broad-based knowledge of what is happening in society at large that good decisions concerning the focus of law enforcement resources can be made.<sup>23</sup>

Mr. Walker, in his testimony, had emphasized a similar point, that it is as necessary for the Secret Service to know where its application of resources is not needed as it is to know where it is. In order for the Secret Service to make such judgments, it requires adequate intelligence on domestic groups and individuals and their potential threat.

In addition to the testimony of high-level administrators in the Treasury Department and the Secret Service, the subcommittee also received the testimony of a former special agent of the U.S. Secret Service. Mr. Dario O. Marquez served for 8 years with the Secret Service in New York and Los Angeles as a criminal investigator, coordinated security arrangements for many heads of state and government visiting the United States, and traveled with Secretary of State Henry A. Kissinger and Vice President Nelson A. Rockefeller. Mr. Marquez is currently President of MVM Corporation, a private firm specializing in industrial security consulting. Both his experience while an agent of the Secret Service and his current professional concerns were highly relevant to the interests of the subcommittee.

Mr. Marquez was highly critical of the criminal standard of the Levi guidelines and gave firsthand testimony about its inadequacies. On November 19, 1977, elements of the terrorist group known as the Weather Underground Organization (WUO) were arrested in Los Angeles, Calif., and Houston, Tex., and charged in connection with a conspiracy to bomb the offices of California State senator John Briggs. One defendant, later convicted, was Clayton Van Lydegraf, identified

<sup>22</sup> *Ibid.*, p. 134.

<sup>23</sup> *Ibid.*, p. 137.

as the head of the Prairie Fire Organizing Committee, a support group for the WUO. At the time of the arrests, Mr. Marquez was an investigator for the Secret Service in the Los Angeles area and was particularly concerned with terrorist activities in the area.

I was responsible for monitoring the activities of the Revolutionary Committee of the Weather Underground and the Prairie Fire Organizing Committee in connection with the attempted bombing of State Senator Briggs' office. Fortunately for all concerned, the FBI had infiltrated two agents into the revolutionary committee approximately 4 years prior to the issuance of the Levi guidelines. Because of the information provided by those undercover agents, the planned bombing was prevented. Under the now current regulations, the FBI would be extremely limited in what it could do prior to the groups committing or threatening to commit a criminal act. This standard is totally unsatisfactory with regard to the protective mission of the Secret Service. This is all the more unfortunate when you consider that domestic terrorist groups have a history of telegraphing their intentions by publishing their views, goals, and occasionally their planned actions.<sup>24</sup>

Mr. Marquez concluded his testimony by emphasizing that

The current problem is that the Levi guidelines hinder the adequate protection of this country's leaders. The weakness in the guidelines is the threshold standard for opening a preliminary inquiry, limited investigation or full investigation. Advocacy of violence ought to be sufficient to initiate a preliminary inquiry, particularly when protectees of the Secret Service are the potential victims. \* \* \*

Protection to be effective must be preventive and not reactive. Good intelligence has always been the first perimeter of defense in the protection business. The Levi guidelines are a reactive approach to gathering intelligence. Thus, the agency which has been charged with providing the information necessary to adequately protect our leaders has been effectively removed from the intelligence business. \* \* \*

Under the current guidelines, the FBI and the U.S. Secret Service cannot perform the most rudimentary surveillance. Yet the first question legitimately asked after each attempted assassination is why didn't the FBI and Secret Service uncover the danger before the attempt was made.<sup>25</sup>

Also submitting testimony on August 11, 1982, was Mr. Lynn H. Herring, Chief of the U.S. Park Police of the U.S. Department of the Interior. Chief Herring described the duties of the Park Police:

Our primary responsibility is to provide a full range of police services in certain areas administered by the National Park Service. Moreover, we have responded to other areas of the National Park System for major law enforcement problems. These problems frequently involve some form of rally,

<sup>24</sup> *Ibid.*, p. 91.  
<sup>25</sup> *Ibid.*, pp. 92-93.

demonstration, or action of a specific group. In Washington, D.C., \* \* \* parks and monuments are an integral part of the seat of Government. We provide police services for groups engaged in protests, demonstrations and other public gatherings on a daily basis. \* \* \*

We are without any hard intelligence information concerning groups, their leaders and key members who are issued protest and demonstration permits.<sup>26</sup>

Asked to discuss the impact of the Levi guidelines on the ability of the Park Police to estimate the potential for disruption by a demonstration or group, Chief Herring replied:

Well, prior to April 1976—the Levi guidelines—we would obtain more information, hard intelligence might be a way I would express it, on the various groups that we anticipated in the demonstration. Therefore, as stressed earlier by my colleagues from the Secret Service, that would give us an opportunity to plan for the necessary manpower allocation to provide for public safety and protection.

Without this information, it is very difficult to know what to anticipate, so you can only plan according to the information that you have at hand.<sup>27</sup>

Chief Herring also described two incidents in which the lack of intelligence and information on planned demonstrations proved dangerous to the public safety.

When the Shah of Iran was at the White House with President Carter [November 1977], at that time, we did not have any information concerning the probability of violence by the anti-Shah group. Of course, the subsequent disorder did, as you are well aware, receive widespread news media attention. In order for us to bring the group under control, we had to utilize tear gas which naturally attracted national attention. One of the things that I might mention is that due to the lack of this information, and I might add without prior experience with this particular group, we could not know the anti-Shah group was armed with 2 by 4's, wooden sticks, and closet dowels, that were used as clubs; and, in some cases, they actually had ½-inch-thick plastic shields that were camouflaged as placards and signs. Until the actual violence and civil disorder took place, we were not aware that these signs were actually protective shields. \* \* \* At one point, without any provocation whatsoever, the anti-Shah group attacked both the police, anyone who was in their way, in fact, and the pro-Shah group with a very severe assault, causing and inflicting many injuries on the pro-Shah demonstrators as well as many of our officers.<sup>28</sup>

A second incident in which the Park Police experienced a need for intelligence on the capabilities and intentions of an extremist group prior to a demonstration occurred in January 1979.

<sup>26</sup> *Ibid.*, p. 153.

<sup>27</sup> *Ibid.*, pp. 153–54.

<sup>28</sup> *Ibid.*, p. 154.

More recently, in January 1979, when the Chinese Vice Premier, Teng Hsiao-Ping, visited the United States, there was supposed to be a welcoming committee for the Vice Premier. As it ended up, there were people within that group that—from the information that we later received—were at least associated with the Revolutionary Communist Party, called the RCP. We did not have, I might add, information prior to this event. We were caught completely by surprise. Most of these participants were carrying water-soaked handkerchiefs and missiles. They carried clubs with railroad flares affixed to the ends and bags of marbles that they used against our horse-mounted officers to hinder the effectiveness of the horses. The demonstrators threw rocks, bottles, fish hooks, fish hook weights, and metal fragments.

They had nails made which were soldered together like stars, so that regardless of the direction that they were thrown, you would be pierced with a pointed nail. We also discovered two Molotov cocktail pipe bombs which did not ignite during the assault—the attack. In this particular incident, we also had many officers who were injured.<sup>29</sup>

Chief Herring also indicated that the Levi guidelines had exerted a harmful effect on the ability of the Park Police to make photographs of demonstrations and individuals taking part in them.

Well, prior to the Levi guidelines, we received, on occasions, many photographs of individuals and groups that had caused violence and civil disobedience in other towns or areas throughout the United States, even in other countries, in some cases.

By having these photographs, of course, as stated earlier, it would indicate the probability of violence. \* \* \* we have found in the past, that many times we have a demonstration involving a very peaceful organization that has no record at all of any violence or civil disorder. But some of the people will infiltrate, by whatever means, covertly or overtly, and they will use this peaceful organization as a shield, in order to promote civil disorder or violence.<sup>30</sup>

In a statement submitted to the subcommittee after the hearing on August 11, 1982, Chief Herring reiterated his criticism of the Levi guidelines:

Prior to April, 1976, the Federal Bureau of Investigation provided us [the U.S. Park Police] with information about groups, their members and leaders. Since April 1976, that information has been greatly reduced. For the most part, we only receive information about groups which present an immediate threat to our officers. For example, the FBI may tell us that they have heard that a group is coming to Washington for a demonstration and that they have information that some members of the group have weapons. Yet, because of the

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, p. 157.

Levi Guidelines, this information cannot be confirmed nor can it be regarded as "hard" intelligence as a result of the Levi restrictions.

As a result, we do not have an effective intelligence capability.<sup>31</sup>

In a letter of December 3, 1982, signed by Mr. J. Craig Potter for Mr. G. Ray Arnett, Assistant Secretary for Fish, Wildlife, and Parks of the U.S. Department of the Interior, Mr. Potter stated, in response to questions submitted by the chairman of the subcommittee:

The intelligence that we [the U.S. Park Police] currently receive from other Agencies and sources, i.e., newspapers, magazines, and house organs, is less than adequate because this information is not fully validated. Prior to the Levi Guidelines, we were reasonably confident that the Force was receiving intelligence that had been processed and pronounced as reliable.<sup>32</sup>

The letter also indicated the directions in which the guidelines should be revised:

We feel that several aspects of the Guidelines could be examined for clarification and possible improvement. For example, the requirements necessary to begin an intelligence investigation, the application of the criminal standard, and the time limit placed on "full" investigations appear to be areas for consideration.<sup>33</sup>

#### NEED FOR DOMESTIC INTELLIGENCE BY STATE AND LOCAL AGENCIES

In addition to receiving the testimony of representatives of those Federal law enforcement and security agencies that are affected by the Levi guidelines, the subcommittee also sought the expert testimony of local law enforcement personnel involved in law enforcement, security, or demolitions work.

On August 12, 1982, the subcommittee received the testimony of Detective Arleigh McCree, officer-in-charge, Firearms and Explosives Unit, Los Angeles Police Department. Detective McCree, in addition to providing the subcommittee with extensive materials and expert testimony on the extent and nature of extremist and violent groups in the Los Angeles area and elsewhere, also criticized the Levi guidelines as well as other laws and regulations that, in his opinion, have exerted a harmful effect on law enforcement intelligence collection:

I have observed a gradual decaying process in our ability to separate the hoodlums and the terrorists from the law abiding community. This has been brought about by the dismantling of the intelligence community, both on a national and local level.

I am fearful that this well intended, but absurd attitude on the part of Federal and local policy makers will ultimately take a terrible toll in lives. \* \* \*

<sup>31</sup> *Ibid.*, pp. 164-65.

<sup>32</sup> *Ibid.*, p. 179.

<sup>33</sup> *Ibid.*, p. 180.

Like all law enforcement agencies, we in Los Angeles are being hamstrung by local right to privacy type rules; in fact, the Levi Guidelines were used as a model to adopt our intelligence gathering rules.<sup>34</sup>

Inspector Fred W. Raines, Director of the Investigative Services Division of the District of Columbia Metropolitan Police Department, submitted similar testimony. Inspector Raines stated that—

Every day, our police department is faced with situations such as demonstrations of one sort or another, assassination threats or attempts, bomb threats or bombings, assaults, and other miscellaneous crimes. The city has visiting dignitaries virtually every single day. \* \* \* The value of intelligence in assuring the protection of life and property in this city is of utmost importance, particularly in terms of allowing the department to know where to direct manpower and equipment resources. The less information we receive, the less efficient we are in carrying out our responsibilities. This is particularly true in the area of domestic security.<sup>35</sup>

Inspector Raines also expressed dissatisfaction with the current state of domestic security intelligence provided by the FBI to the Metropolitan Police:

We do not keep figures on how much information we obtain from the FBI, but I can tell you that we receive less than I would like. From conversations that our staff members have had at meetings and conventions attended by members of other law enforcement agencies, this decreasing inclination to share is not directed solely toward our department. Like other law enforcement agencies, we rely on the Bureau for information and feedback.<sup>36</sup>

General Order 304-11 of the Metropolitan Police Department, issued on August 1, 1976, established what is essentially a criminal standard for the Investigative Service Division, and, on September 13, 1979, the Department issued "Guidelines for Domestic Security Investigations" that are essentially identical to the Levi guidelines themselves.

The effect of the Levi guidelines on local and State law enforcement intelligence agencies is thus twofold:

(1) because of the dependence of these agencies on the more extensive and sophisticated resources of the FBI, the inability of the FBI to collect, retain, and analyze domestic intelligence reduces the quality as well as the quantity of intelligence available to State and local agencies; and

(2) one result of the adoption of the Levi guidelines by DOJ in 1976 has been the adoption of similar or identical guidelines by at least some important metropolitan police departments (for example, those of the District of Columbia, with special responsibilities affecting the security of the seat of the national government and the security of distinguished foreign visitors, and

<sup>34</sup> *Ibid.*, pp. 222-23.

<sup>35</sup> *Ibid.*, p. 232.

<sup>36</sup> *Ibid.*

of Los Angeles, the second largest city in the United States and an area in which a number of extremist organizations and individuals have been active).

#### SIGNIFICANCE OF THE "BRINKS ROBBERY" FOR DOMESTIC SECURITY

The subcommittee took notice of an incident involving the internal security of the United States and the effectiveness of FBI domestic security functions growing out of the so-called Brinks robbery in Clarkstown, Rockland County, N.Y., on October 20, 1981. During the course of this robbery three individuals were murdered and \$1,589,000 was stolen from a Brinks armored car. The trial of the defendants and investigations by Federal, State, and local authorities were still in course at the time of the hearings and the writing of this report.

Two individuals arrested in connection with the robbery soon after its occurrence were members of an organization known as the May 19th Communist Organization, which was described by Detective McCree to the subcommittee: "This so-called May 19th Communist Organization was nothing more than a splitoff from the Weatherman to start with. It was the east coast split."<sup>37</sup> Following the FBI Oversight hearing before the Subcommittee on Security and Terrorism on February 4, 1982, the FBI submitted information about the May 19th Communist Organization in a letter from Director Webster to the chairman dated June 8, 1982:

May 19th [Communist Organization] is the East Coast branch and an off-shoot of the PFOC [Prairie Fire Organizing Committee], which was the surface support group of the "old" WUO [Weather Underground Organization].<sup>38</sup>

The May 19th Communist Organization was founded in the mid to late 1970's. It published a manifesto entitled "Principles of Unity of the May 19th Communist Organization," which, from internal evidence, can be dated as having been written or produced between January and July 1979. In this manifesto there appear several passages that are supportive of political violence, terrorism, and so-called national liberation movements (that is, terrorist and guerrilla insurgencies) in the underdeveloped countries and elsewhere. One typical passage reads:

Armed struggle is the fundamental tool of oppressed people to win their liberation. We fully support, both politically and materially, the waging of national liberation war against imperialism. Around the world and in the United States, vanguard forces will emerge and have done so through the building of armed clandestine movements and the waging of people's war. A central aspect of our support is the active defense of all political prisoners and prisoners of war captured by the imperialist state.<sup>39</sup>

<sup>37</sup> *Ibid.*, p. 215.

<sup>38</sup> *FBI Oversight Hearing*, hearing before the Subcommittee on Security and Terrorism of the Committee on the Judiciary, United States Senate, 97th Cong., 2d sess., on Oversight on the Operations of the Federal Bureau of Investigation, Feb. 4, 1982 (hereinafter cited as *FBI Oversight Hearing*), p. 42.

<sup>39</sup> This manifesto is retained in the files of the subcommittee.



On October 20, 1981, Judith Alice Clark, a former member of the WUO, was arrested while fleeing the scene of the Brinks robbery in Clarkstown. Miss Clark, currently on trial for her alleged role in that robbery, was a member of the May 19th Communist Organization. On October 27, 1981, Eve S. Rosahn was arrested and charged with criminal facilitation because a vehicle registered in her name was identified as having been used in the escape attempt from the scene of the Brinks robbery. These charges were later dropped, although Miss Rosahn at the time of her release from detention expressed "strongest greetings of solidarity to the captured combatants" of the Brinks robbery who were still in detention and awaiting trial. Miss Rosahn was also a member of the May 19th Communist Organization. On November 9, 1982, Sylvia Baraldini was arrested in New York and charged with conspiracy to commit armed robbery in company with suspects in the Brinks robbery. Miss Baraldini was identified as the "national treasurer" of the May 19th Communist Organization.<sup>40</sup>

In his letter of June 8, 1982, Director Webster stated:

Police intelligence sources advised the FBI that members of the PFOC and the May 19th Organization were interchangeable as late as December 1978 and, therefore, the New York FBI Office recommended that the May 19th not be opened as a separate Domestic Security investigation at that time as the Prairie Fire Organizing Committee was already being investigated. \* \* \* The Prairie Fire Organizing Committee investigation was closed by the office of origin, San Francisco, and the Department of Justice was so advised by memorandum dated June 5, 1979. This case, like the one WUO, was closed because of a lack of information indicating group was involved in criminal activity therefore its continuation could not be justified.<sup>41</sup>

As Director Webster admitted during questioning by Senator East in the FBI Oversight hearing on February 4, 1982, the May 19th Communist Organization was not the subject of a domestic security investigation at the time of the Brinks robbery of October 20, 1981, or at any time previously, although a limited level domestic security investigation of the organization was opened on October 29, 1981 (that is, 9 days after the Brinks robbery).

The significance of these facts is that an openly extremist organization, with ties to and overlapping membership with known terrorist groups, could not be investigated under the Levi guidelines because of the criminal standard of the guidelines. The FBI was aware of the existence and nature of the May 19th Communist Organization but did not seek an investigation of it because of its near identity with the PFOC. The investigation of the PFOC was closed because of the

<sup>40</sup> See Edward Hudson, "A Charge Against Defendant in Brink's Holdup Dropped," *New York Times*, Jan. 29, 1982, p. B1; M. A. Farber, "Behind the Brink's Case: Return of the Radical Left," *New York Times*, Feb. 16, 1982, pp. B1-B4; Selwyn Raab, "Woman Accused of Planning Crimes with Brink's Suspects," *New York Times*, Nov. 10, 1982, p. B5. On September 3, 1983, Baraldini was convicted of charges of racketeering and conspiracy. On September 14, 1983, Clark and two other defendants were convicted of three charges of second-degree murder and four charges of first-degree armed robbery arising from the Brinks case. On October 6, 1983, Clark and the two other convicts received sentences of 75 years to life imprisonment.

<sup>41</sup> *FBI Oversight Hearing*, pp. 41-42.

criminal standard in June 1979, at which time the May 19th Communist Organization had already become an independent organization and had published or was about to publish its manifesto advocating the support and perpetration of political violence. If the May 19th Communist Organization was judged to be nearly identical in composition to the PFOC, and if a domestic security investigation of the PFOC could not continue because of the absence of indicated involvement in criminal activities, then the May 19th Communist Organization could not have been investigated for the same reason. The criminal standard of the Levi guidelines therefore was responsible for the absence of an investigation of the May 19th Communist Organization (some members of which were later allegedly involved in armed robbery or murder or in the support of these crimes) prior to the actual occurrence of the Brinks robbery.

Given the fact, as reported by former Special Agent Marquez, that FBI informants in the WUO in 1977 (emplaced prior to the Levi guidelines) were responsible for the prevention of the bombing of Senator Briggs's office, it can be concluded that similar investigation of the May 19th Communist Organization prior to the Brinks robbery could have prevented that crime and the deaths of three innocent persons during its course and aftermath. Awareness of the ideological advocacy of and support for political violence in the propaganda of the group, indications of its contacts with former or current convicts with violent backgrounds, knowledge of its membership or leadership (all of which could be learned largely through overt and public sources) or awareness of possible weapons training and accumulation, obtaining of safehouses, and planning of violent activities (which may be learned through clandestine surveillance) could have alerted investigators to the true nature of the May 19th Communist Organization and to the imminence of criminal and violent activities. In the absence of such investigative techniques, it is virtually impossible for law enforcement authorities to learn of such activities or to prevent them.

It may also be noted that even under the limited investigation that was initiated, new informants could not be emplaced or recruited, the surveillance of mail could not be used, and the electronic surveillance of telephone communications was prohibited. As of June 8, 1982 (8 months after the Brinks robbery), only a limited investigation had been authorized by the FBI. As of August 20, 1982, however, the FBI had initiated a full investigation of the May 19th Communist Organization.

#### CRITICISMS BY DIRECTOR WEBSTER

Director Webster also discussed the provisions of the Levi guidelines in his testimony on June 24. Although he expressed some criticisms of specific provisions of the guidelines, he appeared to disagree with the critical assessments of other Federal and local law enforcement officers:

It is difficult to measure the effect of these guidelines on our operations, but we believe they have served us reasonably well. They provided a statement of policy for the Bureau at

a time when our authority in these matters was the subject of critical debate in Congress and elsewhere. And there have been no successful suits against an FBI agent for activities arising out of domestic security investigations that occurred after the guidelines were adopted.<sup>42</sup>

Director Webster did express a desire that the Levi guidelines be revised, at least in some particulars. The specific revisions that he recommended included the removal of the prohibition of the establishment of informants in limited and preliminary investigations and the extension of the time limits for domestic security investigations. With regard to the criminal standard, Director Webster was less critical:

I believe that our domestic security investigations today are best understood if they are viewed as another form of criminal intelligence. They entail not only determining who committed specific criminal acts, but also how those individuals relate to others similarly motivated, how they are financed and supported logistically, and who their leadership is. In this respect, the terrorist groups functioning today are no different from other criminal enterprises, except that their motivation may be political rather than financial. They should be pursued as organized criminal enterprises and the FBI should undertake to gather both criminal intelligence and evidence for prosecution. This would allow us to cross organizational lines in our investigation without regard to what particular group or element of the group might call itself.<sup>43</sup>

The statement of Director Webster appears to reflect a desire on his part to retain the character of domestic security investigations as essentially criminal investigations—as established by the criminal standard of the Levi guidelines—rather than as intelligence investigations. As several of the witnesses from the other law enforcement agencies, both Federal and State, pointed out, however, it is difficult for domestic security investigations, as criminal investigations, to anticipate criminal or imminent criminal conduct, since such conduct must be known or reasonably suspected prior to the initiation of the investigations. Furthermore, Director Webster appeared to be evaluating domestic security investigations principally in terms of their value for the prosecution of criminal elements, not in terms of their value for the prediction or anticipation of criminal conduct or of their intelligence value.

#### CRITICISMS BY FORMER AGENTS

Former agents of the FBI who testified before the subcommittee expressed considerably more critical attitudes toward the Levi guidelines and the criminal standard contained in them than did Director Webster. On June 25, the subcommittee received the testimony of three well-known and widely respected former agents who had been professionally involved throughout their careers with domestic intelligence and security matters. These were W. Mark Felt, former Acting Associate Director of the FBI; Edward S. Miller, former Assistant Director of the FBI for Intelligence; and Joseph A. Sizoo, a former

<sup>42</sup> *Hearings*, pp. 8-9.

<sup>43</sup> *Ibid.*, p. 11.

Deputy Assistant Director to four different Assistant Directors of the FBI Intelligence Division and a career Special Agent of the FBI for 37 years. Mr. Felt and Mr. Miller attracted nationwide attention in 1978 and subsequent years due to their indictment and later conviction on November 6, 1980, for conspiring to violate the constitutional rights of eight American citizens, described as "relatives and acquaintances" of fugitive members of the terrorist Weather Underground Organization by unlawfully authorizing warrantless surreptitious entries into the residences of the eight persons in 1972 and 1973. The purpose of the surreptitious entries was to obtain information that might lead to the location and apprehension of the terrorists, who had claimed responsibility for a series of bombings that resulted in the death of a policeman. On December 15, 1980, Mr. Felt and Mr. Miller were sentenced to pay fines of \$5,000 and \$3,500, respectively. The controversial verdict and sentence were reversed by President Reagan on April 15, 1981, when he issued a full executive pardon for both Mr. Felt and Mr. Miller.<sup>43a</sup>

Mr. Felt, in his opening statement, referred to "the cumbersome restrictions of the Attorney General's guidelines, which attempt to regulate security investigations with standards which apply to the criminal area." He continued:

This is like comparing watermelons and cucumbers. It is because of these restrictions that the FBI cannot now investigate violence-prone groups such as the National Socialist Party of America, with which John W. Hinckley, Jr., was associated for a time—the Progressive Labor Party, an avowed Communist group which directs its younger members to enlist in the U.S. Army to learn military tactics for use when the time comes for the overthrow of our Government by force and violence—the Ku Klux Klan, a violence-oriented group on the far right—the Weather Underground Organization, also an avowed Communist group which was responsible for scores of bombings and many deaths, including the recent murders of three fine men and the serious wounding of two others during the attempted Brink's robbery in Nyack, N.Y., October 20, 1981—to mention but a few of such groups.<sup>44</sup>

Like Director Webster (and several other witnesses), Mr. Felt emphasized that he favored "guidelines for FBI investigative jurisdiction in the domestic security area" and that while in the FBI he had assisted in the preparation of a draft charter, to be enacted into law by Congress, under which adequate guidelines for domestic security investigations could be formulated. The charter and proposed Executive order were not enacted or issued, however, and Mr. Felt stated that the Levi guidelines issued in 1976

had little resemblance to the original proposals submitted by the FBI and were drawn up by persons who obviously had no knowledge of the problems involved. As a result, the guidelines are far too restrictive.<sup>45</sup>

<sup>43a</sup> On November 15, 1983, the convictions of Messrs. Felt and Miller were vacated by the U.S. Court of Appeals for the District of Columbia.

<sup>44</sup> *Ibid.*, p. 76.

<sup>45</sup> *Ibid.*

In discussing the criminal standard specifically, Mr. Felt explained:

In a criminal investigation, your basic purpose or your target is prosecution. You have to be sure that during the investigation, any evidence which is collected, anything which might possibly be used to lead toward evidence is obtained through standards which are—which will stand up in a criminal court; whereas, in the intelligence field, both domestic and foreign, your target is not necessarily—in fact, it is probably not criminal prosecution, so the same standards do not apply.<sup>46</sup>

Mr. Miller concurred with that statement and added:

Intelligence investigations are not necessarily directed for the purpose of prosecution. If, indeed, prosecutive material is developed during an intelligence investigation, then you prosecute or you consider prosecution.<sup>47</sup>

Mr. Sizoo, who, at the time of his testimony, was president of the Society of Former Special Agents of the FBI, was also critical of the criminal standard. After an extensive review of recent cases involving domestic terrorism and their investigation by the FBI and other authorities, Mr. Sizoo concluded:

Thus, I am led to the conviction that the present guidelines are too restrictive and some adjustments should be made. The application of a criminal standard to all domestic security situations, and that is almost what it amounts to, does not provide sufficient latitude. I do not think the FBI should be asked to operate without guidelines, however, as it was required to do some years ago. Reasonable legislative guidelines or a charter should be established by the Congress, guidelines which should not be subject to change by every new administration, guidelines which will provide desirable guidance to the investigative agency, and protect the welfare of the Nation and the rights of all its citizens.<sup>48</sup>

#### INVESTIGATION OF ADVOCACY

One aspect of the Levi guidelines and their impact on domestic security investigations that was of particular interest to the subcommittee involved the degree to which the advocacy of violence or of criminal or revolutionary activity may be investigated under the criminal standard of the guidelines. It is generally well known, and was emphasized by several witnesses before the subcommittee, that terrorist and terrorist support groups frequently publicize their advocacy, support, and practice of political violence in an effort to legitimize their activities and distinguish them from common crime. An example of such rhetorical advocacy is afforded by the manifesto of the May 19th Communist Organization quoted above, and Detective McCree and the Investigative Services Division of the Metropolitan Police De-

<sup>46</sup> *Ibid.*, p. 85.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, p. 89.

partment provided the subcommittee with many other examples, some of which are printed as exhibits.

Virtually all of the witnesses who had experience in counterterrorist and domestic security intelligence work emphasized that the availability of such materials to investigators is of considerable value. By collecting, evaluating, analyzing, and collating such documents, investigators can learn or can estimate the nature of the group, its interconnections with other groups, its ideological orientations, its membership or adherents, its objectives, tactics, and internal structure, and its possible connections to foreign powers. Intelligence of this kind can be of immense value in anticipating the targets of terrorist attacks, the occurrence of their attacks, and their capability for certain kinds of violence, as well as in establishing lines of investigation by which the perpetrators of violence can be identified and apprehended.

Critics of the Levi guidelines have frequently argued that the criminal standard of the guidelines does not permit the FBI to investigate groups or individuals on the basis of their advocacy of violence or criminal or revolutionary activity alone. Since the criminal standard does not permit the initiation of a preliminary investigation except "on the basis of allegations or other information that an individual or a group may be engaged in activities which involve or will involve the use of force or violence and which involve or will involve the violation of federal law," and since advocacy of criminal, violent, or revolutionary activity is not generally illegal, it would appear that advocacy alone is excluded as a basis for initiating a domestic security investigation by the Levi guidelines.

This conclusion was reinforced by a statement by Mr. Paul Nugent of the Terrorism Section of the FBI, testifying on June 21, 1979, before the Subcommittee on Oversight of the Permanent Select Committee on Intelligence of the House of Representatives. Congressman C. W. Bill Young of Florida, a member of the subcommittee, asked Mr. Nugent if the Progressive Labor Party (PLP), a Maoist Communist group that advocates the violent overthrow of the U.S. Government and the infiltration and subversion of the U.S. Armed Forces, was under investigation by the FBI. Mr. Nugent replied:

Absolutely not. \* \* \* due to the nature of the investigations which are conducted under the Domestic Security criteria today, if you have seen the guidelines, it is very specific in that advocacy or rhetoric is not the criteria on which we can base a domestic security investigation. There has to be that one step further, involvement in force and violence and violation of Federal law, or at least a conspiracy to violate some Federal law with force and violence on which we can base basically a criminal type approach to an investigation, not a searching for programs which groups may advocate in the press or in speechmaking and so forth.<sup>49</sup>

On the basis of Mr. Nugent's (and the FBI's) interpretation, it would not be possible to open an investigation on the ground that the

<sup>49</sup> *Pre-Employment Security Procedures of the Intelligence Agencies*, hearings before the Subcommittee on Oversight of the Permanent Select Committee on Intelligence, House of Representatives, 96th Cong., 1st sess., May 16, 17, 24, and June 21, 1979, pp. 207-8.

subject had advocated the use of force or violence or other violent or illegal activities, and the collection and analysis of the publications of extremist groups—newspapers, manifestoes, periodicals, pamphlets, and leaflets, et cetera—would not be permitted. Thus, the FBI, under this interpretation of the guidelines, would not be allowed to read, analyze, or retain the publication of the PLP, *Progressive Labor*, in which the infiltration and subversion of the Armed Forces is advocated, nor would the FBI be able to collect, read, or retain the “Principles of Unity of the May 19th Communist Organization” or other publicly available documents such as are printed as exhibits in the hearings.

Director Webster in his statement before the subcommittee on June 24 questioned whether the guidelines do in fact forbid the Bureau to read and retain publicly available documents. He stated that “There is no prohibition against the practice in the guidelines.”

The problem stems largely from the Privacy Act which prohibits agencies from maintaining records on how one exercises first amendment rights unless it is in connection with an authorized law enforcement activity. Thus, we cannot collect that information unless the group is under active investigation.<sup>50</sup>

Mary Lawton, Counsel for Intelligence Policy in the Department of Justice and one of the authors of the Levi guidelines, concurred with Director Webster in this assessment of the Privacy Act:

However, the one thing that none of the guidelines can do is change the statutory limitations. The Privacy Act not only prohibits collection of information about how an individual exercises his first amendment rights outside of law enforcement investigations; it prohibits an agency from collecting any information not authorized by statute or executive order as part of its mission, when that information concerns individuals. Those constraints do not change when we change the guidelines.<sup>51</sup>

Director Webster also testified that Mr. Nugent’s interpretation of the restrictions of the guidelines was no longer current within the FBI, and he suggested that, while a rhetoric that occasionally or loosely advocated violence was not sufficient to initiate an investigation, advocacy of violence is substantially different:

An advocacy of kinds of conduct that carry to fruition, do in fact violate the guidelines—form the basis today for a look at the operation. It does not mean that we are going to turn to wiretaps, mail covers, penetrations and so on, but it does require a good look.<sup>52</sup>

In a written response of August 30, 1982, to questions submitted by the chairman on June 14, 1982, the FBI in response to the question, “Can the FBI read, clip or research publicly available documents of a group or individual prior to the initiation of a preliminary investigation?” stated:

<sup>50</sup> *Hearings*, p. 12.

<sup>51</sup> *Ibid.*, p. 29.

<sup>52</sup> *Ibid.*, p. 27.

The FBI may read, clip and research publicly available documents concerning a group or individual prior to a preliminary inquiry. However, the Privacy Act prohibits the Bureau from indexing such information in a manner that permits retrieval by name of the individual unless it is in connection with an authorized law enforcement activity.<sup>53</sup>

In response to a question concerning the amount of analytical resources devoted to such a research by the FBI, the Bureau stated:

We do not devote research and analytical resources to clipping and reading activities. During our ongoing domestic security investigations, those FBI personnel responsible for these investigations clip and read pertinent information which comes to their attention.<sup>54</sup>

Yet, in response to the question, "How many domestic security investigations under the guidelines have been opened in the last 5 years on the basis of advocacy alone?" the Bureau stated:

The review showed ten cases which were opened based on the advocacy of violence alone. These cases were incorrectly opened usually in the early stages of the implementation of the Guidelines or by field offices not familiar with domestic security. They were ordered closed by FBI Headquarters.<sup>55</sup>

In other words, even though advocacy of violence may be grounds in principle for opening a domestic security investigation, in practice there are no such investigations. Those investigations that were initiated on grounds of advocacy alone were closed by FBIHQ, and the Bureau does not devote any of its organizational resources to the reading and clipping of publicly available documents of groups that advocate violence or criminal conduct.

#### EXCEPTIONS TO THE PRIVACY ACT

Despite the interpretation of the Privacy Act by Director Webster and Miss Lawton, there remain grounds for believing that this statute does not in fact forbid the investigation of advocacy of violence or of criminal activities. The Privacy Act (5 U.S.C. 552a), enacted by Congress on December 31, 1974, states in section (e)7:

Each [federal] agency that maintains a system of records shall \* \* \* maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity. \* \* \*

Senator East suggested that the language of the Privacy Act pertains specifically to individuals and not to organizations (for example, the Progressive Labor Party and the May 19th Communist Organiza-

<sup>53</sup> *Ibid.*, p. 69.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*



tion), so that the statute presents no bar to reading and collecting the organizational literature of extremist groups.

Furthermore, although the Privacy Act forbids the maintaining of records on the exercise of first amendment rights by individuals except as part of an authorized law enforcement activity, it does not establish any standard for the threshold at which such an activity may be initiated. The term "law enforcement activity" is not defined in the Privacy Act, and it may be presumed that, if an authorized domestic security investigation is an authorized law enforcement activity under the terms of the Act, then the lowering of the threshold at which a domestic security investigation may be initiated would not be restricted by the Privacy Act.

The Privacy Act allows for the collection of information resulting from an individual's exercise of first amendment rights when "expressly authorized by statute." Executive orders have the force of statute law, and Miss Lawton in her testimony before the subcommittee expressly mentioned Executive orders as well as statutes as constituting exceptions to the restrictions of the Privacy Act. Executive Order 12333, "United States Intelligence Activities," issued by President Reagan on December 4, 1981, provides a recent and specific authorization for the collection of information on individuals. Part 2.3 of E.O. 12333 reads:

Agencies within the Intelligence Community are authorized to collect, retain or disseminate information concerning United States persons only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General, consistent with the authorities provided by Part 1 of this Order. Those procedures shall permit collection, retention and dissemination of the following types of information:

(a) Information that is publicly available or collected with the consent of the person concerned. \* \* \*

The term "Intelligence Community" and "Agencies within the Intelligence Community" as defined within E.O. 12333 include "The intelligence elements of the \* \* \* Federal Bureau of Investigation (FBI). \* \* \* (Part 3.4.f.6.) It may be noted also that Executive Order 10450 (as well as other Executive orders) governing the Federal Employees Security Program authorize the FBI to collect information concerning the loyalty and security of individuals. Such information would include records of the advocacy of violence or of criminal or revolutionary conduct.

In addition to these legal exceptions to the Privacy Act, it is relevant to note that both the Secret Service and the U.S. Park Police adhere to different interpretations of the act. Director Simpson of the Secret Service testified on August 11:

We also recognize, of course, that the restrictions imposed by the Privacy Act play a role in determining the nature of domestic intelligence collection efforts. While this is true, it is also true that the present guidelines, as written and interpreted, impose restrictions beyond those contemplated by the Privacy Act. It is our view that so long as there is a demon-

strable need for the collection of such information, no such artificial barriers should exist. The Privacy Act does not require the existence of a criminal case to justify the creation of a record by a law enforcement agency. Neither, in our view, should the guidelines. Further, of course, the Privacy Act applies to individuals, not groups. Good cause does not exist to expand these limitations.<sup>56</sup>

Chief Herring of the Park Police stated in response to questioning by the chief counsel of the subcommittee, Mr. Joel S. Lisker, that the Park Police do in fact, as a routine matter, collect publicly available documents of groups and demonstrators that are not under investigation for criminal activities:

Mr. LISKER. \* \* \* Do you read the literature that is distributed by these groups?

Mr. HERRING. Yes, we do. In fact, one of our practices has been for years, and one of the things that our intelligence officer does, is to collect any handbills and literature that is passed out at any of these demonstrations. We want to know our adversary and who might have the propensity for any type of violence. So, therefore, we do read all the literature, the handbills, the philosophy, anything that they might put out as to their mode of operations, such as their SOP as far as how to conduct a demonstration and the entire organizational structure.

Mr. LISKER. Would it surprise you to know that the FBI does not read this information, does not collect it and, further, I think, has said that there is not, in their view at least, not much value in looking at this kind of information?

Mr. HERRING. I would be surprised, yes. I would not be able to comment on that specific issue.<sup>57</sup>

The conclusion must be, therefore, that there are grounds for questioning the interpretation of the Privacy Act expressed by Director Webster and Miss Lawton. Other Federal agencies, no less bound by the Privacy Act than the FBI and the DOJ, do not adhere to their interpretation and do in fact collect the literature of groups not under investigation as part of a law enforcement activity. Indeed, the language of the Privacy Act allows for that activity by Federal law enforcement and intelligence agencies, and Executive orders, with the force of statute law, allow for the collection by such agencies of information concerning the advocacy of violence and of criminal conduct.

#### CONCLUSION

Virtually all the witnesses emphasized that domestic security guidelines are necessary and desirable. Guidelines serve to establish regular procedures by which the FBI (and State and local agencies) can allocate the proper amounts and kinds of resources to domestic security investigations. They provide standards by which the value of investigating potential subjects can be estimated. Furthermore, guide-

<sup>56</sup> *Ibid.*, pp. 137-38.

<sup>57</sup> *Ibid.*, p. 160.

lines provide a form of authorization from DOJ under which the FBI is permitted to pursue certain kinds of investigation and to make use of certain kinds of investigative techniques. Without guidelines, FBI field offices and agents would be reluctant to make use of the full range of their authority and resources to conduct domestic security investigations. After the exposures, investigations, prosecutions, litigation, reforms, and security leaks of the post-Vietnam and post-Watergate periods, and particularly after the indictment, trial, and conviction of Edward S. Miller and W. Mark Felt, many FBI agents might reasonably exhibit reluctance to pursue domestic security investigations, even when there is a clear need for them. Director Webster expressed this feeling well in the FBI Oversight hearing held by the subcommittee on February 4, 1982:

My problem today is not unleashing the FBI, my problem is convincing those in the FBI that they can work up to the level of our authority. Too many people have been sued, too many people have been harassed and their families and life savings tied up in litigation and the threat of prosecution. So that we and others like us run the risk that we will not do our full duty in order to protect our individual selves.

So, we need clear-cut parameters of what we can do. Now, if those parameters cut off too soon or make it difficult to do our job, then we ought to change those guidelines. But we do need the guidelines.<sup>58</sup>

Virtually all the witnesses also emphasized the need for serious and extensive reforms of the Levi guidelines as currently written. Director Webster, as well as other witnesses from the Federal and local law enforcement communities, emphasized the need to extend the time limits allowed for investigations and to remove or reduce the restrictions on the recruitment and emplacement of informants in the lower levels of investigation. Yet by far the most frequently voiced criticism of the Levi guidelines was that the criminal standard is an inappropriate intrusion of a law enforcement concept in what is properly and primarily an intelligence activity.

#### DOMESTIC SECURITY INVESTIGATIONS: LAW ENFORCEMENT VERSUS INTELLIGENCE

The conception of domestic security investigations as primarily intelligence activities rather than law enforcement activities is by no means new. It is safe to say that this conception has pertained throughout most of the history of domestic security investigations in the United States and that it remains the predominant conception in most democratic countries today. Indeed, the assimilation of domestic security investigations to law enforcement functions alone is itself a novelty.

It is important to understand the implications of the concept of domestic security investigations as intelligence, since this concept leads to an evaluation of their purpose and results that differs from their evaluation as law enforcement activities alone. In the report of the

<sup>58</sup> *FBI Oversight Hearing*, p. 19.

General Accounting Office on "FBI Domestic Intelligence Operations—Their Purpose and Scope: Issues To Be Resolved" of February 24, 1976, for example, the domestic intelligence program of the FBI was evaluated in part in terms of the number of prosecutions, convictions, and referrals for prosecution that resulted. By this standard, it was found that only a small percentage of domestic security investigations had resulted in prosecutorial action, and the Report concluded that

Other than effectively identifying and gathering information on groups and individuals affiliated with groups that espouse and carry out subversive and extremist activities, the FBI's domestic intelligence operations do not appear to have had much impact.<sup>59</sup>

The assumption of the study was that the primary purpose of domestic intelligence was to "prosecute and convict subjects for violating appropriate statutes."<sup>60</sup>

Yet, given the principal sources of authorization for domestic security investigations cited by the GAO and by the FBI itself (28 U.S.C. 533, Executive Order 10450, Presidential directives, and other statutes and Executive orders), there is insufficient basis for ascribing to domestic security investigations the sole or principal purpose of law enforcement. Rather, these sources of authority and the history of domestic security investigations in the United States make clear that law enforcement has been at most only one purpose of domestic intelligence and that the intelligence function was, until comparatively recently, its principal purpose.

Moreover, the concept of domestic security investigations as intelligence activities was emphasized by the late J. Edgar Hoover, who, as Director of the FBI, was primarily responsible for the evolution of FBI domestic intelligence. Shortly before his death in May 1972, Director Hoover, in a memorandum of February 25, 1972, to Acting Attorney General Richard Kleindienst, specifically articulated the intelligence role of domestic security investigations. As the Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church committee) noted in regard to Director Hoover's memorandum:

The Bureau investigated "any individual" who "is affiliated with or adheres to the principles of" an organization "which has as an objective" the violent overthrow of the government or "other criminal activity detrimental to the National defense." The Bureau also made clear that the purpose of these investigations was not just to "obtain evidence for prosecution," but also

" \* \* \* to obtain intelligence data in order to have day-to-day appraisal of strength, dangerousness, and activities of the organization; and to keep the Department of Justice and other affected Government agencies advised."

These investigations were partly based on criminal statutes,

<sup>59</sup> GAO Report, p. 147.

<sup>60</sup> *Ibid.*, p. 138.

although the Bureau admitted that "subversive activity \* \* \* often does not clearly involve a specific section of a specific statute."<sup>61</sup>

Domestic intelligence, as all the witnesses testified and as courts have acknowledged, is a valuable and necessary part of law enforcement. Intelligence can significantly assist in the anticipation and prevention of violence or the violation of the law (the proactive function) as well as in the investigation of past violations of the law and the apprehension of the violators (the retroactive function). Yet, in addition to the proactive and retroactive functions, domestic intelligence also provides a means by which concerted efforts to weaken or undermine a government or a society may be detected and evaluated. It is precisely efforts of this nature, which constitute the phenomenon of subversion, of which Director Hoover was thinking in his memorandum to Attorney General Kleindienst.

#### THE NATURE OF SUBVERSION

The phenomenon of subversion has traditionally been associated with the attempts of hostile foreign powers or their agents to wage covert warfare on targeted countries or organizations. Prior to the issuance of the Levi guidelines, domestic intelligence as conducted by the FBI included the investigation of purely indigenous subversion (for example, by "hate groups" and extremists of a variety of kinds) as well as of subversive groups and individuals having connections with foreign powers (for example, the German American Bund of the 1930's and the Communist Party U.S.A.). Following the adoption of the Levi guidelines, foreign connected subversion has been investigated under the Foreign Counter-Intelligence (FCI) program of the FBI Intelligence Division. In recent years, foreign connected or sponsored subversion has generally been called "covert action" or (in the case of the Soviet Union) "active measures."

Implicit in the concept of subversion as Director Hoover discussed it and as it has traditionally been understood is the idea that certain kinds of activities, although legal and non-violent in themselves, may present a threat to the basic order and institutions of a free society. As Philip Selznick noted:

Subversion refers not only to a revolutionary program, but also to the manipulation of social institutions for alien ends, this manipulation being conducted covertly in the name of the institution's own values. It is this type of subversion which is meant when fear is expressed of the effect of communism in the schools, in the labor movement, and in liberal organizations. Such activities, and ultimate overthrow of the government, are of course related, but concern for the integrity of the institutions themselves leads us to seek modes of self-defense long before any clear and present danger to established authority is demonstrable.<sup>62</sup>

<sup>61</sup> *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, U.S. Senate, book III, Apr. 23, 1976, p. 549.  
<sup>62</sup> Philip Selznick, *The Organizational Weapon: A Study of Bolshevik Strategy and Tactics* (Glencoe, Ill.: Free Press, 1960), p. 316.

A key element of subversion therefore is the intention to make use of legitimate processes and institutions for illegitimate ends, to "work within the system to destroy the system"—for example, to exploit the first amendment to promote the destruction of freedom of expression, to use the electoral process to make free elections impossible or meaningless, or to use educational institutions to propagandize for revolutionary or totalitarian ideologies. In a free society, there can be very little legal prohibition of this kind of activity, but there must be public awareness of the nature of subversion and of the parties that entertain subversive goals and use subversive tactics. Domestic security investigations can play a vital role in maintaining this public awareness by informing public authorities and the public in general of the presence, strength, goals, and tactics of subversion in this sense—as Director Hoover put it, a "day-to-day appraisal of strength, dangerousness, and activities."

Under the criminal standard of the Levi guidelines, it has been virtually impossible to investigate subversion that is restricted to legal and non-violent activities, even though the existence and importance of indigenous subversion should be obvious. The arts and techniques of psychological warfare, propaganda, disinformation, political agitation, and infiltration have been the subject of intense study and development by governments and private groups. The value of these techniques as cost-effective, minimal-risk means of covertly manipulating or weakening a targeted government or organization has been discussed and acknowledged by almost all modern governments and by many reputable scholars, and these techniques have been used by non-governmental groups (for example, extremist political parties and cults) as well. One recent example in the United States is the declared intention of the Progressive Labor Party to infiltrate and subvert the U.S. Armed Forces, and myriad similar examples may be found in the extremist literature of both the far right and the far left. It was primarily concern over the possibility of such infiltration and subversion by both domestic and foreign-connected elements that led to the adoption of the Federal Employees Security Program in the 1940's and 1950's.

To authorize investigation of subversive activities by Federal agencies is not to prohibit or prosecute them but merely to affirm that duly constituted authorities have the right and the duty to know of and understand subversion in order to inform the public (for example, through the oversight and investigative responsibilities of Congress) and to design countermeasures to restrict and reduce the subversive influence. Investigation of domestic subversion therefore does not have primarily a prosecutorial or law enforcement purpose, although, as an intelligence activity, it may lead to the exposure of foreign connections, an intention or capability for violence on a large-scale, criminal activities affecting national security, or connections to other current violent or criminal activities.

Under a criminal standard, domestic security investigations of domestic subversion cannot be authorized, since the subjects of the investigation are not presently or about to be involved in violent and criminal activities. The application of the criminal standard to domestic security investigations therefore prevents the effective collection of intelligence on domestic subversion.

Even when the acknowledged purpose of domestic security investigations is restricted to law enforcement, the intrusion of the criminal standard leads to a paradoxical situation and the diminution of the results of the investigations. A domestic security investigation cannot be initiated prior to obtaining information that indicates actual or imminent criminal activities, but the investigating agency cannot become aware of such information unless it is brought to its attention by those parties privy to the plans and activities of the group or individual that is planning the crime. Investigation cannot begin until there is an indication of violence or the violation of the law, but violence or violation of the law cannot be known until an investigation has begun or a crime has been committed. Since terrorist and criminal groups typically conceal their plans and not infrequently severely sanction those members and adherents who reveal their plans, it is extremely difficult, under a criminal standard, to provide effective proactive and preventive intelligence. This paradoxical situation suggests the importance of the ability to read and analyze the publicly available documents and literature of extremist or terrorist support groups, to emplace or recruit informants, and to utilize other techniques of investigation that may develop information indicating illegal activities on the part of extremist elements.

Domestic security investigations and domestic intelligence have purposes other than those of law enforcement, although their law enforcement function remains important. Domestic intelligence can provide proactive indications of imminent criminal or violent activities, and its retroactive function can lead to the apprehension of violators and the development of evidence for prosecution. In addition to these law enforcement functions, however, domestic intelligence conducted by Federal and local agencies can lead to an understanding of the nature of subversion, of the extent, purposes, interconnections, and tactics of subversive groups and activities; and by informing public authorities, it can contribute effectively to the protection of the foundations of a free society. To evaluate domestic security investigations purely in terms of their prosecutorial results leads to a false interpretation of their value and purpose, and the application of the criminal standard to domestic intelligence diminishes the value and the results of domestic security investigations considered either as intelligence or as law enforcement activities.

#### RECOMMENDATIONS

Based on the findings of its hearings, the subcommittee suggests the following recommendations for guidelines to govern domestic security investigations by the FBI:

- (1) The Attorney General should retain guidelines for domestic security investigations.
- (2) The current Levi guidelines should be extensively revised.
- (3) The principal revisions to the Levi guidelines should include:
  - (a) The deletion of the criminal standard as the threshold for initiating domestic security investigations;
  - (b) A specific authorization for the investigation of systematic advocacy of violence, illegal activities, or other ac-

tivities calculated to weaken or undermine the Government of the United States or of any State;

(c) The extension of the time limits for investigations, especially those for preliminary and limited investigations;

(d) Relaxation of current restrictions on the recruitment and emplacement of new informants; and

(e) Lowering of the threshold for the initiation of limited investigations and relaxation of current restrictions on techniques permissible in investigations (for example, physical surveillance and interviews for purposes other than identification of the subject of investigation should be permitted at the preliminary level of investigation).

(4) The new guidelines should be tested and evaluated against the experience of Federal, State, and local law enforcement and intelligence agencies and of those agencies and institutions most vulnerable to and concerned with domestic security threats.

(5) After a period of testing, the guidelines should be evaluated by the FBI, other Federal, State, and local law enforcement and intelligence agencies, other agencies and institutions involved in or exposed to domestic security matters or threats, and the Congress of the United States.

(6) After testing and evaluation in the manner described above, the Department of Justice should present legislative recommendations to Congress to justify the enactment into law of adequate and effective guidelines for domestic security investigations.

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